

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,)
) 15-CR-00252 (PKC)
Plaintiff,)
)
V.) United States Courthouse
) Brooklyn, New York
)
JOSE MARIA MARIN AND)
JUAN ANGEL NAPOUT,) TUESDAY, FEBRUARY 14, 2017
) 3:30 p.m.
Defendants.)
_____)

TRANSCRIPT OF CIVIL CAUSE FOR MOTION HEARING
BEFORE THE HONORABLE PAMELA K. CHEN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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14 Proceedings recorded by mechanical stenography, transcript
15 produced by computer-assisted transcript.
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1 THE CLERK: Criminal Cause for Motion Hearing,
2 Docket 15CR252, United States versus Jose Marin and Juan Angel
3 Napout. Will the parties please state their appearances for
4 the record.

5 MR. NITZE: Sam Nitze, Kristin Mace, Paul Tuchmann,
6 and Keith Edelman for the United States. Good afternoon,
7 your Honor.

8 THE COURT: Good afternoon, everyone.

9 MS. PINERA-VAZQUEZ: Good afternoon, your Honor.
10 Sylvia Piñera and John Pappalardo on behalf of Juan Angel
11 Napout.

12 THE COURT: Good afternoon.

13 MR. STILLMAN: Your Honor, Charles Stillman, Jim
14 Mitchell, and Julio Barbosa for Mr. Marin.

15 THE COURT: Good afternoon to you as well.

16 MS. PINERA-VAZQUEZ: Your Honor, and, also, I
17 believe on the phone is Mr. Napout and another attorney
18 representing Mr. Napout, Jackie Becerra.

19 MS. BECERRA: Your Honor, this is Jacqueline
20 Becerra, on behalf of Mr. Napout. He is with me. I'm having
21 trouble hearing through the phone.

22 THE COURT: That's fine. I think everyone was
23 standing up and not using their microphones a moment ago.
24 I'll instruct everyone to use the mike so that Mr. Napout and
25 Ms. Becerra can hear us. Can you hear us now?

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1 MS. BECERRA: It's a little better.

2 THE COURT: We have two matters to deal with today.
3 I'm only going to require Mr. Napout to be here for the first
4 issue. In fact, it would be cumbersome to have him here for
5 the entire oral argument.

6 So I'm assuming -- and I'm looking at his attorneys
7 who are here -- that you are still waiving his appearance for
8 the oral argument on the motion; is that right?

9 MR. PAPPALARDO: Yes, your Honor.

10 THE COURT: We have an interpreter who is previously
11 sworn. If you'll state your name for the record.

12 THE INTERPRETER: Federal-certified Spanish
13 interpreter, Mario Michelena.

14 THE COURT: Ms. Becerra, can you hear the
15 interpreter?

16 MS. BECERRA: Yes, we can hear the interpreter
17 clearly.

18 THE COURT: So good afternoon to you, Mr. Napout, as
19 well. We have an interpreter here for your use. Can you hear
20 the interpreter, Mr. Napout?

21 MS. BECERRA: Yes, I can hear the translation
22 perfectly. Good afternoon, your Honor.

23 THE COURT: Can everyone hear the interpreter on
24 this end? So the first matter I want to take up is the
25 request of the government to have Mr. Napout confirm a waiver

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1 of a challenge and an appeal on an issue that was resolved by
2 Judge Levy. So the first thing I want to do -- and,
3 Ms. Becerra, if at any point you can't hear the interpreter,
4 just speak up.

5 So I want to summarize the issue that arose first,
6 and then I will advise Mr. Napout of his right to challenge or
7 appeal Judge Levy's ruling. And then I'll confirm that
8 Mr. Napout waives his right to challenge or approve that
9 decision. Now, as I'm sure Mr. Napout knows, his attorneys
10 filed a motion based on a claim of attorney-client privilege
11 on his behalf in this case. And one of the arguments that his
12 attorneys made in favor of that privilege was that a
13 Paraguayan attorney named Esteban Burt, B-u-r-t, represented
14 Mr. Napout but not CONMEBOL.

15 Contrary to Napout's attorney's argument, however,
16 Magistrate Judge Levy, who was asked to decide this issue by
17 the Court, ruled that Mr. Burt, in fact, represented both
18 CONMEBOL and Mr. Napout; and that, as a consequence, CONMEBOL
19 possessed the right to waive attorney-client privilege and not
20 Mr. Napout. Now, let me say that Judge Levy didn't put that
21 on the record, at the time, but that is the necessary
22 consequence of that ruling under the case law. Now, let me
23 turn to the parties for a moment, because I can see that
24 Mr. Pappalardo is about ready to jump out of his chair.

25 Mr. Pappalardo, do you think that Judge Levy has not

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1 made that ruling yet?

2 MR. PAPPALARDO: No, your Honor. I don't think that
3 was Judge Levy's ruling. I think Judge Levy ruled that during
4 this period of time, Mr. Burt represented -- both represented
5 Mr. Napout, and at the same period of time represented
6 CONMEBOL. So to the extent that he was representing CONMEBOL,
7 if CONMEBOL chose to engage in a waiver of the attorney-client
8 privilege with respect to limited subject areas which, as I
9 understand, based upon the filing by the government, has
10 occurred.

11 THE COURT: Hang on. Meaning that CONMEBOL has,
12 in fact, waived that privilege?

13 MR. PAPPALARDO: The papers indicate, your Honor,
14 CONMEBOL has waived the privilege with respect to any
15 investigation that CONMEBOL was taking, but did not waive the
16 privilege with regard to commercial transactions.

17 THE COURT: Hold on. That all may be true, but what
18 I'm trying to confirm with Mr. Napout, and make sure he
19 understands, is that the implication of Judge Levy's ruling is
20 that the government has won part of the attorney-client
21 privilege issue, based on Judge Levy's finding that Burt
22 represented both CONMEBOL and him, thereby giving CONMEBOL the
23 right to exercise the waiver that you just mentioned. And I
24 don't hear you disagreeing with the proposition that based on
25 Judge Levy's finding that both were represented, CONMEBOL is

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1 entitled to waive that attorney-client privilege, as to the
2 investigation.

3 MR. PAPPALARDO: Your Honor, you're exactly right.
4 CONMEBOL, based upon the ruling, is permitted to waive, and
5 they've executed a limited waiver, with regard to the
6 investigation that was undertaken.

7 THE COURT: As I understood, from reading the
8 hearing transcript also, the government didn't disagree or
9 didn't object to the notion that CONMEBOL could still, rather,
10 actually -- what I was going to say was that there still
11 wouldn't be a privilege applicable to corporate
12 decision-making, as opposed to the investigation. But the
13 bottom line is I don't think any of that matters, so long as
14 you don't disagree that the upshot of Judge Levy's ruling is
15 that CONMEBOL is the one who can exercise the privilege or
16 decide to waive it, rather.

17 MR. PAPPALARDO: If I may, your Honor?

18 THE COURT: Yes.

19 MR. PAPPALARDO: The hearing before Judge Levy was
20 intended to produce evidence to establish that there was a
21 common interest agreement regarding one thing and one thing
22 only. And that common interest agreement was in place, as
23 argued by us, to protect the conversations and communications
24 by Mr. Burt, as it related strictly to commercial
25 transactions. At the beginning of the hearing, your Honor, it

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1 was clear that CONMEBOL was not waiving the privilege with
2 regard to commercial transactions, and so the communications
3 regarding them are still privileged.

4 THE COURT: That may be true, but, again, I think
5 it's beside the point. The only reason that I am advising
6 Mr. Napout about this issue that was presented to Judge Levy
7 is that he understand that the consequence of Judge Levy's
8 ruling, is that it's CONMEBOL who decides whether to waive any
9 privilege or not, and not Mr. Napout, because the privilege
10 belongs to CONMEBOL.

11 MR. PAPPALARDO: Your Honor, I would disagree with
12 that, and I don't think that's Judge Levy's ruling. I think
13 that to the extent that Mr. Napout was representing CONMEBOL,
14 CONMEBOL can waive. Mr. Burt, your Honor, not Mr. Napout.
15 Having said that, your Honor, confidential communications
16 between Mr. Burt and Mr. Napout are not subject to that
17 ruling, having nothing to do with CONMEBOL.

18 THE COURT: I'm going to look to the government for
19 a minute. I know there was a reference to that issue towards
20 the end of the hearing; I think you raised it. But all I can
21 say is that in order for Mr. Napout, in my mind, to give a
22 fully informed waiver, I have to be able to advise him about
23 what the implication is of Judge Levy's finding that Mr. Burt
24 represented both CONMEBOL and Napout during the relevant
25 period of time, which is -- now, maybe there is some argument

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1 about what the scope of that co-representation is, or whether
2 or not it doesn't necessarily give CONMEBOL the right to waive
3 privilege to some conversations, or not.

4 But I think if there's some dispute about that
5 still, I'm not sure any waiver that Mr. Napout gives today
6 will go very far; because he may agree not to appeal Judge
7 Levy's ruling, but he still may want to appeal the decision
8 about the application of the attorney-client privilege
9 doctrine.

10 MR. PAPPALARDO: If I may, your Honor?

11 THE COURT: Go ahead.

12 MR. PAPPALARDO: If I represent two clients,
13 your Honor, and it's clear that I represent both, one client
14 cannot waive confidential communications that exist with the
15 other client. As an example, if they're solely for the other
16 client. In this case, your Honor, I do think it is very
17 clear -- and you can ask Mr. Napout -- that he does not intend
18 to appeal the ruling. What this has to do with is a practical
19 application of going through the documents that were taken
20 from CONMEBOL to determine whether or not they were personal
21 to Napout or to CONMEBOL.

22 THE COURT: So let me turn to the government for a
23 minute, because this is your application, in a way. Would it
24 suffice, from your point of view, simply to have Mr. Napout
25 confirm that he does not intend to challenge Judge Levy's --

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1 I'll characterize it as limited ruling or limited finding that
2 Mr. Burt represented both CONMEBOL and Mr. Napout during the
3 relevant period of time? And then leave it to the parties to
4 continue to fight over what that means, in terms of coverage
5 of any waiver or existing surviving privilege.

6 MS. MACE: Thank you, your Honor. Yes.

7 THE COURT: Have a seat, and use the microphone.
8 Speak really loudly.

9 MS. MACE: Just a couple quick clarifying points,
10 with regard to a waiver by CONMEBOL, I don't think there's any
11 need to put on the record today the scope of that waiver,
12 because that's CONMEBOL's, and it can change its position at
13 any time. I agree with Mr. Pappalardo that Judge Levy did not
14 rule on the application of his findings and decision as to
15 specific documents. What the government requests today is
16 that the defendant confirm that he doesn't request a written
17 ruling from Judge Levy, because he understands the bases of
18 Judge Levy's ruling, and also that the defendant will not
19 challenge or appeal the ruling that Mr. Burt represented both
20 CONMEBOL and Mr. Napout.

21 THE COURT: During the relevant period of time.

22 MS. MACE: From May 27th, 2015, through April 2016.
23 And to that end, the government has prepared a set of
24 questions, that I have shown to defense counsel as well, that
25 we think would accomplish what is necessary here to have the

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1 record clear. I haven't heard yet whether or not they agree
2 to these questions, but I'd be happy to hand them up, if that
3 would be of assistance.

4 THE COURT: Any objection, Mr. Pappalardo?

5 MR. PAPPALARDO: Yes, your Honor. I think the --
6 I'll sit down. I think the only thing for this court to
7 determine today is whether or not Mr. Napout intends to appeal
8 the ruling. What he was shown -- as an example, your Honor,
9 question two is -- you know, intrudes upon the attorney-client
10 privilege, in and of itself. I believe the question for
11 the Court would be: Do you have conversation with your
12 counsel? Based upon that conversation, are you satisfied that
13 you understand what transpired? And based upon that
14 understanding, knowing that you have a right to appeal, do you
15 wish to appeal?

16 THE COURT: Okay. Folks, this is a situation of too
17 many cooks in the kitchen. I was going to do this a little
18 more directly. I'm happy to get the input, to be sure. So
19 I'm going to use a little of what everyone suggests.

20 Mr. Napout, first of all, do you read or speak any
21 English?

22 DEFENDANT NAPOUT: Yes. Yes. Some, yes, I can.

23 THE COURT: Okay. Have you understood some of
24 what's been said in English?

25 DEFENDANT NAPOUT: Yes, some. Yes, some.

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1 THE COURT: Have you had any difficulty
2 understanding the Spanish-language interpreter?

3 DEFENDANT NAPOUT: No, no, no. None, whatsoever.

4 THE COURT: Now, are you aware that there was a
5 hearing before Magistrate Judge Levy on the attorney-client
6 privilege issue?

7 DEFENDANT NAPOUT: Yes, I was completely aware of
8 that.

9 THE COURT: Okay. And were you aware that one of
10 the issues that your lawyers raised with Judge Levy was the
11 question of whether Mr. Burt represented both you and CONMEBOL
12 during the relevant period of time?

13 DEFENDANT NAPOUT: Yes, I was aware of that.

14 THE COURT: And the period of time that was
15 referenced was May 27th, 2015, through April 2016. Was that
16 your understanding?

17 DEFENDANT NAPOUT: Yes, that was my understanding
18 also.

19 THE COURT: And are you also aware that Judge Levy
20 ruled against your attorney's position and decided that
21 Mr. Burt did represent both you and CONMEBOL during that
22 period of time?

23 DEFENDANT NAPOUT: Yes, I'm aware of that.

24 THE COURT: Are you aware of the reasons or the
25 grounds upon which Judge Levy made that decision?

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1 DEFENDANT NAPOUT: Yes, I am also aware of that.

2 THE COURT: Okay. And do you understand also that
3 one possible implication of Judge Levy's ruling is that
4 CONMEBOL will be able to decide whether to waive any
5 attorney-client privilege that might apply here?

6 DEFENDANT NAPOUT: Yes, I am completely aware of
7 that.

8 THE COURT: And that waiver, if they choose to do
9 that, could be over your objection.

10 DEFENDANT NAPOUT: Yes, in a limited fashion, as I
11 heard a moment ago.

12 THE COURT: Okay. Now, are you aware that you have
13 the right to challenge, on the first level, Judge Levy's
14 ruling to me? And by that ruling, I mean his finding that
15 Mr. Burt represented both you and CONMEBOL.

16 DEFENDANT NAPOUT: Yes, I am aware of that also.

17 THE COURT: And are you aware that if I were to rule
18 as Judge Levy did, you could further challenge that,
19 potentially, to a court of appeal?

20 DEFENDANT NAPOUT: Yes, I am aware of that also.

21 THE COURT: And is it your desire to give up that
22 right to challenge Judge Levy's ruling, both to me and to any
23 court of appeal?

24 DEFENDANT NAPOUT: Yes, that's exactly how it is.

25 THE COURT: Also, Judge Levy had discussed with the

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1 parties the possibility that he would reduce to writing his
2 finding about Mr. Burt's representation of both you and
3 CONMEBOL. And if Judge Levy did that, he would put some
4 detail into the decision about the grounds for his ruling.
5 And is it your understanding that your attorneys told
6 Judge Levy that they did not want him -- they were not asking
7 him to put down his decision in writing? Did you understand
8 that?

9 DEFENDANT NAPOUT: Yes, I did understand that. I am
10 aware of that.

11 THE COURT: Okay. Do you agree with that decision
12 not to have Judge Levy's decision put into writing, on this
13 issue about Mr. Burt representing both you and CONMEBOL?

14 DEFENDANT NAPOUT: Yes. I agree completely. Yes.

15 THE COURT: Is there anything else that the
16 government would have him put on the record?

17 MS. MACE: No, your Honor. I think that's
18 sufficient. Thank you.

19 THE COURT: Mr. Pappalardo, any clarification
20 required?

21 MR. PAPPALARDO: Not of this colloquy, no.

22 THE COURT: All right. Terrific. So that concludes
23 the first part of this proceeding. And, Mr. Napout, you are
24 free to hang up. If you'd like, at a minimum, though, I'm not
25 going to require the interpreter to continue to interpret the

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1 entire rest of the proceeding. Thanks very much, Ms. Becerra,
2 and thank you, Mr. Napout.

3 DEFENDANT NAPOUT: Thank you very much, your Honor.

4 THE COURT: Did you want to disconnect, Ms. Becerra?

5 MS. BECERRA: I think we're going to disconnect,
6 because it would be hard for him to hear the parties in
7 English. So we'll disconnect.

8 THE COURT: Thank you so much.

9 Let's get to the main act here, which is the oral
10 argument on Defendant Marin's and Defendant Napout's motion to
11 dismiss, which set forth different bases. So the way we'll
12 proceed is, I'll let Mr. Marin's attorneys go first with their
13 argument, and then let the government respond, and then have
14 Mr. Napout's attorneys go next, and have the government
15 respond to those.

16 Mr. Stillman.

17 MR. STILLMAN: Your Honor, most of what we have to
18 say today, your Honor, is spelled out in our papers, and I'm
19 certainly not going to burden you with repeating that. I
20 think I want to make a couple of observations while we're
21 here. And, also, I don't know whether or not your Honor has
22 seen this; actually, it's helpful. We found it the other day
23 on a government website, and so what it has is a list of the
24 defendants -- I'll call it your case, because it's now in
25 front of you, your Honor, and the status of those cases, and

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1 then there's also a thing called additional cases. You guys,
2 I'm sure have seen this, right? And it has the other
3 individuals who have entered pleas to, I assume, the related
4 case. I'm happy to hand that up, your Honor, to you, in case
5 you haven't seen it.

6 THE COURT: I haven't seen what you're referring to,
7 I don't believe, but I think I'm pretty aware --

8 MR. STILLMAN: It's the first time I've seen it in
9 two pages, and it seemed helpful. That's all.

10 THE COURT: Go ahead. Does the government have any
11 objection to my looking at this?

12 MR. NITZE: We've seen it.

13 THE COURT: I think you may have produced it.

14 MR. STILLMAN: Sorry about that. So when you go
15 through that, your Honor, what you see is -- in the
16 Superseding Indictment, there are 27, I think, named
17 defendants, of whom 15 have appeared, 10 have entered guilty
18 pleas, and there are 5 left scheduled for trial, on November
19 the 6th of this year.

20 THE COURT: You're right.

21 MR. STILLMAN: And the second page of the document
22 reflects, your Honor, that there were ten individuals who
23 pleaded guilty to, I'm sure, some aspect of what we're all
24 here about, and there's one corporate-deferred prosecution.

25 THE COURT: Right.

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1 MR. STILLMAN: Now, in a sense, your Honor, when you
2 see all that has happened, one would think that, well, we're
3 down five, and this is going to be a short trial that
4 your Honor could knock off in a week, you know.

5 THE COURT: God willing, yes.

6 MR. STILLMAN: I don't think that's the reality, so
7 you kind of ask yourself what's the reality? The reality is
8 that you come to the first charge of this indictment, the
9 indictment reading 235 pages, and it's all about the RICO
10 charge, so it's the RICO charge that we address in our motion,
11 your Honor. And, as I get it, it's a classic hub and spoke.
12 I think that's the parlance of the day, the hub being, FIFA.
13 Your Honor knows what that is. FIFA, the hub and the spokes,
14 are the various confederations; CONMEBOL, CONCACAF, UEFA -- I
15 don't know how to say that -- CAF, and AFC, and OFC.

16 And so assuming that I'm correct, your Honor, that
17 the analysis is the hub-and-spoke conspiracy, the point that
18 we make in our motion, and the reason that we bring this on
19 before you, is that this is a wheel without a rim. And it is
20 the absence of the rim, your Honor, that drives our motion to
21 dismiss, at this time.

22 THE COURT: Yes.

23 MR. STILLMAN: And in the absence of the rim, we
24 need to look at what is the relationship, what is the
25 relationship, between my client, Jose Maria Marin, going on

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1 85 years of age, now faced with this rimless RICO conspiracy
2 charge that's going to have him in federal court for, I have
3 heard -- the lowest number I heard was 6 weeks, and if I had
4 to put a nickel down, I'd tell you, in spite of our best
5 efforts, it would be longer than 6 weeks. But that's neither
6 here nor there, for the moment, your Honor.

7 And so when I look at the absence, the absence of
8 this rim, your Honor, the government -- one of the things the
9 government says is, well, look at -- there was a tournament
10 called Copa América. And Copa América, apparently,
11 your Honor, the CONMEBOL confederation, together with the
12 CONCACAF confederation, got together and they did a
13 tournament. And so the government says that begins to give
14 you some of the rim. Well, it is kind of ironic that the
15 government would say that, because that tournament took place
16 once in a hundred years, so you kind of wonder where that
17 connection comes from.

18 And so my point is, your Honor, that even if you
19 took that and you put that on the rim, you couldn't drive this
20 wheel very far, because it would collapse, in as much as the
21 legs of the -- the spokes of this rim really don't come
22 together. And so the government says, well, sorry, Stillman,
23 you didn't look at our indictment. Didn't we state in our
24 indictment that these groups conducted business with one
25 another and they worked together? And they say, well, the

1 case law says that's enough for us. We've said that, and
2 we'll see you in court.

3 And if you're right, at the end of the trial, and
4 you make your Rule 29 motion, and we were wrong and you were
5 right, you walk away from the courtroom. And the reason I
6 made this motion, your Honor -- and we understand, you know,
7 this is a long time. I understand I have the uphill battle on
8 this point, but I felt sufficiently strong about it that I
9 thought we should bring it to your attention, at this time.
10 Look, I understand the U.S. Attorney's Manual doesn't bind
11 them, as a legal proposition, but it's certainly instructive
12 to look at the manual when the manual says that in these
13 situations -- they're saying to the troops, you know, the
14 lawyers representing them, you know, give some detail here
15 when you're doing one of these RICO cases.

16 That's my simplistic way of making the point, but I
17 think it makes the point kind of well, your Honor. And the
18 fact of the matter is they haven't done that here. So Jose
19 Maria Marin, and myself, Jim, and Julio Barbosa are left to
20 put our defense together, recognizing that we're going to be
21 facing this very lengthy trial, with what looks to be a real
22 flaw that comes out at the end, and we raise it at the end and
23 we win, okay, wonderful. But what I'm trying to do is avoid
24 that, but not avoid a trial, your Honor. I think it's
25 important for you to have our position on this very clear.

1 At the end of the day, your Honor, our view is that
2 you dismiss the RICO, and there will be a trial. There will
3 be a trial of Jose Maria Marin on six very serious federal
4 criminal charges, and, indeed, one of those have three
5 tournaments, so to speak, your Honor, and two charges for
6 each, a wire fraud and a money laundering for each. And when
7 you look at them, and if he gets convicted of any or all, he's
8 facing substantial federal prison time. So I guess what I'm
9 saying is the RICO should go. I'm not saying it's a walk in
10 the park for him; there's still a battle ahead.

11 But there's a battle, your Honor, that frees us from
12 having to deal with the RICO conspiracy that they say lasted
13 25 years, that spanned continents, that Marin may never have
14 walked on but certainly never conspired on. There will be no
15 evidence that he had anything to do with any of those other
16 things. And as I said, he will stand trial. He'll have to
17 stand trial on their theory of the Copa América tournament and
18 any alleged corruption they say happened there, and he'll have
19 to answer charges.

20 Our presentation to your Honor, by dismissing -- I
21 understand, you know, as I was putting this together -- and
22 the reason I handed that document up to you is that -- so here
23 I am moving to dismiss a RICO count that 15 people have said
24 they're guilty. So you can say, Stillman, look, everybody
25 else seems to have no trouble with that; how come you have

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1 trouble with it? And the reason we have trouble with it,
2 your Honor, is because it is as it affects Jose Maria Marin,
3 and it is on that basis, as we spell out in our papers, we
4 would urge your Honor to dismiss Count One as to Mr. Marin.
5 Thank you.

6 THE COURT: Can I ask you a question, though? I
7 must confess when I read -- it's a metaphorical question, in
8 the sense that I'm asking you about your metaphor. You use
9 this rimless wheel, and I have to admit I had some trouble
10 understanding exactly what you meant. You mean there's no
11 connection that keeps this conspiracy together, in your mind.

12 MR. STILLMAN: I'll tell you exactly when. And
13 you'll laugh at me, so I won't tell you. The first time I saw
14 a conspiracy case, I was a 22-year-old kid, working for a
15 federal judge, and still in law school. And the reading, as
16 conspiracy law evolved -- your basic conspiracy, you know, I
17 get together with my partners over there, and we have a
18 conspiracy. But things became more complicated. The way this
19 indictment is structured, the theory of this case, is you have
20 FIFA, this federation of soccer, and paragraphs about the
21 great things they're doing for soccer, this great sport
22 that -- it's really a bigger sport outside of America, but it
23 is in America, at least now.

24 And then you have these confederations; one in
25 Africa, and one for South America, and one for Central

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1 America. And so where they connected, they're connected at
2 the center, because they're all hooked into FIFA; they go to
3 FIFA meetings, and they do all these FIFA meetings. But
4 insofar as the allegations of corruption, of taking all this
5 money, and cheating, and lying, and all that stuff, that, if
6 you look at this, the way the government has -- the way this
7 is structured, and the way this plays out, is it happened
8 separately in each of those six spokes of the wheel.

9 And there's never, that piece of evidence, at least
10 alleged in this -- that I see in this case, is somebody says,
11 hey, let's get the six groups together, let's sit down, let's
12 talk, let's plan, conspire together, so that the rim now sits
13 on the wheel, on the spokes. And it just doesn't exist here,
14 your Honor; that's the reason for the metaphor. And I believe
15 that that's -- you'll find case law that talks about it as
16 well.

17 THE COURT: But isn't RICO conspiracy different,
18 exactly, in that way, in that to allege sufficiently --
19 because we're talking about allegations versus proof, which is
20 one of the problems I have with your motion; is that you seem
21 to be focused on allegations of specific evidence or proof,
22 because there's no question here that this is a very detailed
23 indictment. It spans hundreds of pages; right?

24 MR. STILLMAN: Two hundred and thirty-five
25 paragraphs.

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1 THE COURT: But to allege an enterprise, really, it
2 just has to be an association in fact. It doesn't necessarily
3 have to all have worked together on these particular corrupt
4 events or predicate acts, per se; and there are many
5 paragraphs in the indictment about how FIFA did work together,
6 and had all these constituent groups, of which your client was
7 an official for one of them. And so I think the battle you're
8 fighting is a bit like tilting at windmills, maybe, because
9 this is why RICO was structured, I think, the way it is. It's
10 not your typical conspiracy, necessarily, the hub and spoke
11 you describe, but it really is a much more overarching
12 concept, isn't it, in the way it's written.

13 MR. STILLMAN: In some sense, that's right. And
14 it's interesting that your Honor uses windmill, because
15 windmill is another --

16 THE COURT: Another round thing that spins.

17 MR. STILLMAN: So it's kind of another illusion.
18 I'll use that term.

19 THE COURT: We should stop.

20 MR. STILLMAN: I would say the government is tilting
21 those things. But sorry.

22 THE COURT: Perhaps.

23 MR. STILLMAN: The point, your Honor, is --

24 THE COURT: That could be their Exhibit Number 1.

25 MR. STILLMAN: The Supreme Court in the *Boyle* case

1 spoke to that; talks about that there are three factors of the
2 association in fact required for RICO. And then *Boyle* said
3 for purpose, purpose, do bad things in soccer; second,
4 relationships among those associated with the enterprise; and,
5 third, longevity. So, one, the purpose: Do bad things in
6 soccer. Longevity: Twenty-five years.

7 So the issue that we turn to, your Honor, is
8 relationships among those associated; that's our point. Our
9 point is that to the extent that Jose Maria Marin was
10 associated with anybody, in what he's alleged to have done,
11 his association was limited to his spoke -- to that spoke,
12 your Honor. He wasn't associated with any of the other people
13 involved in the other spokes.

14 THE COURT: But you don't disagree -- because I
15 think you're acknowledging you have an uphill battle -- that
16 the allegations in the indictment say all the things they need
17 to say, in terms of there was, in fact, this association and
18 communication; you just don't agree that that's what they're
19 going to be able to prove, but in terms of the pleading of the
20 indictment, is there really some defect you can point to,
21 other than you don't think the government will be able to
22 prove it?

23 MR. STILLMAN: Your Honor, the defect I point to is
24 the failure to put in sufficient -- so that when your Honor
25 looks at this, and we're down the road, and we're on trial,

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1 and it's now -- we're into December and wondering whether
2 we're going to have a Christmas recess during the trial,
3 wondering whether or not -- where's the evidence that gives
4 you that rim to the other spoke, your Honor, and I suggest --

5 THE COURT: But that's what discovery is for.

6 MR. STILLMAN: I get all that, but I'm saying, if
7 you said to me, look, Stillman, if you want Marin to go home
8 and that's the end of the case, he doesn't go home, he has to
9 sit in a federal courtroom and defend six federal charges.

10 THE COURT: He just doesn't want to have to defend
11 this one.

12 MR. STILLMAN: Yes, ma'am.

13 THE COURT: All right. Mr. Nitze or Ms. Mace.

14 MR. NITZE: Yes, your Honor, just briefly. First,
15 RICO conspiracy is a separate offense from the others, and
16 that the defendant faces six other serious federal felonies
17 doesn't say anything about whether the RICO conspiracy itself
18 is properly charged, and the government believes it is. We
19 understand the crux of Mr. Stillman's argument to be that --
20 well, first of all, it is not a hub-and-spoke conspiracy; it's
21 an association in fact enterprise that's been alleged, and we
22 understand the crux of the argument to be that it's not
23 properly alleged; that there's not enough connectivity among
24 confederations, for example, to sustain the pleadings.

25 And the indictment, if you want me to repeat all

1 that's in our papers, but there are many allegations
2 sufficient to meet that requirement in the charging
3 instrument. The indictment alleges that the members
4 functioned as a continuing unit; that the congress of FIFA is
5 made up of its -- representatives of its member associations;
6 that the confederations appoint vice presidents and ordinary
7 members to the Executive Committee. These are people sitting
8 down together to conduct the business of FIFA and other
9 confederations together.

10 The six Continental confederations worked closely
11 with FIFA and with one another. They organize international
12 soccer competitions on a regional basis, sometimes cooperating
13 and coordinating with one other. Over time, the organizations
14 formed to promote and govern soccer and the regions -- and
15 that includes the sports marketing companies that produce the
16 games and put them on television for people to watch -- became
17 increasingly intertwined with one other and with the sports
18 marketing companies. The elements of the association in fact
19 enterprise are alleged to work together.

20 The *Boyle* case cited by the defense sets forth some
21 minimal requirements that must be alleged. We easily satisfy
22 *Boyle*, and, in fact, *Boyle* lifts a whole set of requirements
23 that are not presented by a proper racketeering charge,
24 structure, and hierarchy, and certain organizational elements
25 that needn't be alleged.

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1 THE COURT: One question for you, though,
2 Mr. Stillman said it has to have a common bad purpose; I don't
3 think that's what *Boyle* says. It just has to have a common
4 purpose; right?

5 MR. NITZE: An enterprise may have a lawful and
6 legitimate purpose and be corrupted by the people who conduct
7 the affairs of the enterprise or conspire to do it through a
8 pattern of racketeering activity. So they bring in criminal
9 conduct into the affairs of an enterprise. The enterprise's
10 stated goal and purpose needn't be, on its face, criminal.
11 And, here, certainly FIFA and the world's governing bodies of
12 soccer and sport marketing companies are not conceptually --

13 THE COURT: -- out to do evil.

14 MR. NITZE: They've been victimized by -- the theory
15 of the government's case is that the governing bodies, FIFA,
16 and the confederations, and the associations have been
17 victimized by the conduct.

18 THE COURT: Did you want to respond at all,
19 Mr. Stillman? Come up with any more round objects? I'm
20 kidding.

21 MR. STILLMAN: I just want to say this, your Honor,
22 as I listen to Mr. Nitze, your Honor, I mean, with all of that
23 governing and all of that cooperating, and maybe if you don't
24 like my rim and spoke, spoke and whatever it is --

25 THE COURT: Hub and spoke.

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1 MR. STILLMAN: Then, as I listen, it's kind of like
2 silos, because you have -- each of these confederations,
3 there's a silo. And I read the cases, too. I see what the
4 cases are saying, but it just strikes me, your Honor, that you
5 would think that there would be some allegations -- something
6 in this 235-paragraph indictment that would give you some
7 information, some step to show you that there was -- that this
8 corruption, this terrible thing -- and those things happen,
9 and they are terrible things, but that there was some
10 coordination among the confederations, so that you could have
11 some comfort in knowing that this was one RICO conspiracy,
12 rather than several RICO conspiracies. Thank you.

13 THE COURT: One last question I have for you, you
14 did also argue duplicity.

15 MR. STILLMAN: Duplicity, really -- if your Honor
16 grants our motion, then the duplicity argument falls away. I
17 would put it down as a make-weight argument and wouldn't worry
18 too much about it.

19 THE COURT: I won't worry myself about that one.

20 Mr. Pappalardo.

21 MS. PINERA-VAZQUEZ: Ms. Piñera-Vazquez. Thank you,
22 Judge. Judge, we're a little more ambitious than
23 Mr. Stillman.

24 THE COURT: How dare you say that to poor
25 Mr. Stillman.

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1 MS. PINERA-VAZQUEZ: A little bit more ambitious.
2 Just a tad. We submit that all five counts on which our
3 client has been charged should be dismissed, because the
4 Superseding Indictment does not allege sufficient allegations
5 to apply extraterritorial jurisdiction. It's a bit more of a
6 technical issue. But as I spent yesterday, for many hours,
7 watching what was going on in the news and trying to do this,
8 I realize it can be simplified, and that's what I hope to do
9 today, in order to add what we filed in our pleadings. I'm
10 going to be brief, because I don't want to repeat, and I'm
11 going to go to the crux of the problem. You have a question?
12 Go ahead.

13 THE COURT: I think the simple version of it in my
14 mind is -- I would have to agree with you that the wire fraud
15 alleged is not a proper domestic application of the statute, I
16 think, to agree with five six of your argument. And then the
17 last part of it would be, it would be unreasonable, in any
18 event, because it seems to me your arguments sort of collapsed
19 one onto the other. If the wire fraud that's charged, the
20 wire fraud conspiracy, is not a proper domestic application,
21 you then argue that it doesn't constitute a proper SUA for the
22 money laundering; right? And, then, the whole RICO charge
23 collapses because of those two charges collapsing. That's
24 sort of it, in a nutshell; right?

25 MS. PINERA-VAZQUEZ: As to Mr. Napout, the predicate

1 acts as to the RICO were money laundering and wire fraud.

2 THE COURT: Focus on why it's not a proper domestic
3 application on the wire fraud statute, as to Mr. Napout.

4 MS. PINERA-VAZQUEZ: Then I take it the Court wants
5 me to address the second step of the *RJR Nabisco* case. And I
6 think before I answer the question, I'd like to point out that
7 the *RJR Nabisco* case and the *Microsoft* case were both decided
8 in June and July of 2016, were decided after that Superseding
9 Indictment was returned, in December of 2015. And I think
10 that's important to note, because the law did change in that
11 *RJR Nabisco* case. With your specific question as to the wire
12 fraud, because you're absolutely right, our argument either
13 rises or falls on the wire fraud.

14 The *RJR Nabisco* case, in the 2nd Circuit, before it
15 went up to the Supreme Court, specifically held that wire
16 fraud could not be a basis by which to apply the domestic
17 application of -- could not be applied extraterritorially.
18 What does the court say? The courts say we have to look at
19 the focus, the focus of the wire fraud statute, which would be
20 the second step of *RJR Nabisco*. Because Congress never said
21 that wire fraud was specifically to be applied territorially,
22 then, in this case, what conduct -- and I want to get the
23 language correct, exactly right. The question becomes what is
24 the focus of the wire fraud statute? That's the relevant
25 question; what is the focus of the wire fraud statute?

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1 Now, specifically as to Mr. Napout, I think it's
2 important, because there's 27 defendants, 26 of which are all
3 foreign nationals, involving a foreign conspiracy, involving
4 foreign-born victims. So I think it's really important to be
5 specific as to Mr. Napout, who was a foreign national from
6 Paraguay. What is the focus of the wire fraud statute as to
7 Mr. Napout? Well, we can't assume what Congress would have
8 wanted; we have to look at what makes sense. The focus from
9 the wire fraud statute case was that, as I was able to locate,
10 is really not the actual use of the wire but where was the
11 scheme to defraud? It's a protection of the fraud. That's
12 the focus of the statute.

13 THE COURT: Let me stop you for a moment. You add
14 this additional qualifier; what is the focus of the wire fraud
15 statute as to Mr. Napout? The last three words are what I'm
16 focusing on. The analysis seems to be what is the focus of
17 the wire fraud statute period. Does it have to be specific to
18 the application in this case? Do you know what I'm saying?

19 MS. PINERA-VAZQUEZ: It has to be sufficient as to
20 the allegations related to Mr. Napout in the Superseding
21 Indictment. In other words, the question is --

22 THE COURT: Do the allegations in this case satisfy
23 whatever the focus is, in other words, address whatever the
24 focus is in the wire fraud statute?

25 MS. PINERA-VAZQUEZ: Exactly. Yes, your Honor. So

1 our position in this case is that the government has not
2 alleged sufficient -- specific facts. They've alleged
3 conclusionary allegations, conclusions. They have not alleged
4 specific facts or allegations to overcome the application of
5 the wire fraud statute extraterritorially. What's important
6 about that, Judge, is in the indictment -- and I think
7 Mr. Stillman pointed out, yes, it's a 265-page indictment with
8 92 counts, 27 defendants, 15 schemes, and that sort of gives
9 the impression that it's detailed.

10 It may be detailed, generally, but it's not detailed
11 as to my client, Mr. Napout. The allegations as to Mr. Napout
12 are all conclusory, in that they bunch him in with, for
13 example, Copa Libertadores. They bunch him in with a group of
14 six. Yet, they don't specify how -- and I'm not saying
15 specify in detail; they just have to give more than
16 conclusionary allegations to apply the wire fraud statute
17 extraterritorially. And I think it's important to point out
18 that the courts have held, in assessing the focus of the wire
19 fraud statute, that it's also important for the court to look
20 at the elements of the wire fraud statute and where those
21 elements took place.

22 And I'm sure the Court's aware that the three
23 elements are the formation of a scheme, to defraud victims of
24 money, and the use of the wire communication in furtherance of
25 the scheme. In this case, according to the allegations in the

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1 indictment, the scheme to defraud the victims was not formed
2 in the United States; it was formed outside the United States.
3 There's not one allegation as to Mr. Napout that the scheme
4 was formed in the United States.

5 And the money, which will be to defraud the victims
6 of money, where are the victims? The victims are not in the
7 United States, because the United States government is not a
8 victim in this case. According to the government, the victims
9 in this case, allegedly, are FIFA, which is based in
10 Switzerland; CONMEBOL, which is based in Paraguay; CONCACAF,
11 which, I think, may be in Trinidad. I'm not sure where the
12 base is right now. And the other international organizations.
13 So the victims are not in the United States.

14 The only potential use or connection to United
15 States would be the use of the wires. This is important,
16 because if you notice in the indictment, the government hinges
17 its entire argument on the use of the banking system in the
18 United States. I mean, that's what it boils down to. How on
19 earth does the United States become involved in a game of
20 soccer, an international sport that before the last 20 years
21 didn't even exist in the United States? Didn't exist.

22 How did they become involved and all of a sudden
23 bring the heads of all of these powerful organizations -- who
24 in many of their countries commercial bribery is not even a
25 crime, how do they get them and bring them to the United

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1 States, pick them up and bring them over here? Some of them
2 had bank accounts in the United States. Leoz had an account
3 in Merrill Lynch; somebody else had an account in Citibank,
4 and they used those wires to transfer money. I've seen
5 e-mails from Torneos, which, in this case, was a marketing
6 company headed by Alejandro Burzalo, who basically was based
7 in Argentina. This is important, your Honor. Just give me a
8 second.

9 THE COURT: I'm only looking at our court reporter.
10 You're using a lot of words --

11 MS. PINERA-VAZQUEZ: I'll stay and spell.

12 THE COURT: Just pause. If you use a word like
13 Libertadores, which I can't pronounce nearly as well, you have
14 to stop and spell it out.

15 MS. PINERA-VAZQUEZ: I will.

16 THE COURT: Just take a breath. Take your time.

17 MS. PINERA-VAZQUEZ: Okay. So the question becomes
18 how does Torneos, T-o-r-n-e-o-s, that is a sports marketing
19 company based in Argentina, Buenos Aires, headed by Alejandro
20 Burzalo, who is an Argentinian citizen, who is basically,
21 according to the allegations in the indictment -- that's what
22 I'm going to focus on -- supposedly paying bribes to these
23 individuals all over the world to secure marketing rights?
24 Now, none of these people are government employees. There's a
25 C.P.A. that is not implicated, just basically these heads of

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1 soccer organizations. And now I lost my train of thought
2 before.

3 THE COURT: I think you were trying to say none of
4 this happens in the U.S.

5 MS. PINERA-VAZQUEZ: I'll go back to this -- I was
6 thinking of the spelling. What happens? The only way the
7 government gets the hook is the banking system. Now, what's
8 really important as to Mr. Napout is that there's not one
9 allegation in the indictment that Mr. Napout either used any
10 bank in the United States to receive, transfer, or deposit
11 money. None. And that's important, when you look at the
12 other defendants, because in the indictment there are
13 allegations as to other defendants and the use of the wires.
14 That's not alleged in this indictment as to our client.

15 So if you look at it that way, the formation of the
16 scheme to defraud the victims, which is the Copa Libertadores
17 scheme, the CONMEBOL, which did not take place in the United
18 States -- it took place outside of the United States, in
19 South America, and the victims would have been CONMEBOL, which
20 also took place -- is an entity outside of the United States,
21 and there's no allegation that Mr. Napout used any wire
22 communication in furtherance of the scheme. That, along with
23 the money laundering, based upon which -- I understand
24 your Honor also understood the argument, because they use wire
25 fraud as the specified unlawful activity to support the

1 laundering of the proceeds of the CONMEBOL.

2 Those two counts were false because they don't
3 have -- under *RJR Nabisco* and the *Microsoft* case, there's not
4 enough -- the focus of the wire fraud statute cannot be --
5 doesn't have domestic application, and that's the same thing
6 for the other scheme that Mr. Napout is charged in, which is
7 the Copa América scheme. Again, the same thing; there's no
8 allegation in the indictment that the scheme was formed in the
9 United States, that the victims are U.S. either residents or
10 citizens. They're all foreign entities.

11 It's important, because you can be a victim and you
12 don't have to be a U.S. citizen, but it's overwhelming in this
13 case. There are no U.S. victims. In this case, all the
14 victims are, according to the indictment, FIFA, CONMEBOL,
15 CONCACAF. Those are the victims. And I don't know if you
16 have any other questions, but I think what's really important
17 here -- and I hope I say this word right, but in *RJR Nabisco*,
18 the court, Judge Alito, for the majority, and I believe it was
19 a five-four decision, says something that is so emblematic in
20 this case.

21 He says the United States governs domestically, but
22 it does not rule the world, and that, in this case, is what
23 the government sought to do, rule the world of soccer. Why?
24 According to the indictment, because some of the banking
25 systems were used. That's how they get their hook in the door

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1 as to the entire indictment. But as far as Mr. Napout, there
2 isn't sufficient evidence to overcome the presumption of not
3 applying domestic laws extraterritorially.

4 THE COURT: Let me ask you, though -- I know the
5 government has argued to some extent that they need only show
6 the use of the wires, and that's enough. And, spoiler alert,
7 I'm not sure I entirely agree with that reading of *RJR Nabisco*
8 or the statute as it stands right now. But I think you're
9 ignoring many other allegations in the complaint about the
10 nexus, or focus, or involvement in U.S. parties and interests.
11 So, for example, there are allegations that the scheme
12 involved sales of broadcasting rights in the United States.

13 So, I guess, going to your victim argument, to the
14 extent that that process got corrupted, that would certainly
15 implicate interests in the United States. The organizing of
16 soccer matches in the United States, that was also alleged as
17 part of this scheme. And I'm referring now to the
18 Libertadores scheme number two, which is Count Nine; the
19 holding of some meetings, actually, in the United States; the
20 use of the wire facilities and financial institutions.

21 Now, you say that that's all that was used, but even
22 focusing on that, if co-conspirators are using the banks and
23 the wire system in the United States, it's hard for me to see
24 why that doesn't go to the focus of the wire fraud statute,
25 which is what this is about. But to the extent that you want

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1 to broaden that analysis -- and I don't disagree with you that
2 the law may require me to look a little broader, and there was
3 a case that you relied on, and I think not inappropriately,
4 and I'm going to butcher the name of it, but --

5 MS. PINERA-VAZQUEZ: Starts with a "P"?

6 THE COURT: Yes. Exactly. *Prevezon Holdings*.

7 MS. PINERA-VAZQUEZ: There's actually been a couple
8 more, Judge, which I'd like to --

9 THE COURT: *Prevezon* supports your position that if
10 you have, say, three wire transfers that pass through the
11 United States, that may not be enough. I guess my point is
12 that's not all that's alleged here, and why aren't all of
13 these other things? That was just one scheme; there are a
14 couple of other schemes. Your other argument is that -- but
15 Mr. Napout is not alleged to have done any of these things,
16 namely meet in the United States, or send the wires through
17 the United States, or arrange for soccer matches in the U.S.

18 But that, then, ignores the fact that he's charged
19 as part of a conspiracy; and for the conspiracy, as you know,
20 he just needs to agree that somebody within this conspiracy is
21 going to do some of these things, namely send wires through
22 U.S. financial institutions, or arrange meetings in the U.S.,
23 or engage in conspiracy to achieve a purpose, and somebody
24 then carries out acts that do touch upon the soil, as well as
25 the interest of the United States.

1 So it strikes me that you're viewing the
2 government's argument so narrowly -- or, rather, the
3 allegations in their complaint so narrowly that you're
4 ignoring what I think are legitimate allegations of not only
5 the use of the wires, which one could argue is the focus of
6 the wire fraud statute, but the greater interest of the United
7 States. And, by the way, these marketing companies that you
8 mentioned, some of them are based in Miami; right?
9 Trafficking is one of the big ones that implicated in many of
10 these schemes. Isn't that enough?

11 MS. PINERA-VAZQUEZ: Judge, if they would have done
12 that, that would be enough.

13 THE COURT: For a domestic application. Sorry. I
14 should have been clear. For a domestic application of the
15 wire fraud statute.

16 MS. PINERA-VAZQUEZ: No, Judge, and let me explain
17 to you why. If they would have done everything that the Court
18 just said, they would have alleged, not proven -- would have
19 alleged that Mr. Napout agreed that other people were going to
20 use the wires in the United States to transfer proceeds of a
21 bribe, there would have been more specific and not just been
22 conclusory allegations that reached conclusions, and then
23 maybe that would have been enough --

24 THE COURT: Let me stop you for a second. They
25 allege he participated in a conspiracy to accept bribes with

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1 respect to the marketing and broadcasting rights for various
2 tournaments. You're saying, though, that more than that, they
3 would say he conspired specifically to use the US wires to do
4 that?

5 MS. PINERA-VAZQUEZ: I don't necessarily think that
6 it has to be that language, but they have to say more. They
7 conclude that he entered into an agreement to commit wire
8 fraud. That's basically all they've done; they haven't listed
9 anything else. And I don't want to get confused. There's 15
10 schemes going on in this indictment, 15 schemes of which my
11 client is only charged in two. While I believe you said
12 Traffic, which it is based in Miami, down the street from my
13 office, to be honest. It is based in Miami, but my client had
14 nothing to do with Traffic, so that wouldn't apply to him.

15 The important thing to understand here -- and I
16 think *RJR Nabisco* does it well and also a recent case, which
17 was the *Petroreos*, P-e-t-r-o-r-e-o-s --

18 THE COURT: That is actually the case I was
19 thinking, not *Prevezon*.

20 MS. PINERA-VAZQUEZ: -- which is a 2nd Circuit case.
21 Basically, your Honor, there could be -- in this case, they
22 actually say exactly what the court says. They begin with
23 three minimal contacts with the United States; the financing,
24 a witness came here; the invoices were sent to bank for
25 payment, and the bank issued payment. However, absent any

1 allegation that the scheme was directed from or to the
2 United States, the activities involved in the alleged scheme
3 falsified took place outside the United States.

4 THE COURT: But the fact that the schemes did
5 involve arranging from matches in the United States or
6 broadcasting rights to the United States, you don't think that
7 it brings it within even that language?

8 MS. PINERA-VAZQUEZ: I don't believe that. My
9 client, with regard to what the Court is saying, is not
10 sufficiently alleged in the indictment. And as far as the two
11 schemes my client is (sic), which is Copa Libertadores and
12 Copa América, there's no allegation in the indictment
13 regarding what your Honor just said, and I think that's the
14 problem. There is a presumption that domestic laws do not
15 apply extraterritorially, and that's what -- the
16 Eastern District of New York, 2nd Circuit, all the way up to
17 the Supreme Court, and that's why they instituted this
18 two-step statute.

19 And it's important to understand that there has to
20 be more than simply the use of the banks; otherwise, quite
21 frankly, your Honor, we can basically indict, probably,
22 everybody in the world, because our banking systems is used by
23 the entire world. So we can probably allege some crime that
24 is not a crime in whatever, in France, and indict anybody. So
25 I think that's why the court, I think, sought to limit the

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1 exercise of jurisdiction with the *RJR Nabisco* case. And we
2 submit that, our client, all five counts fail, because they
3 hinge and are based on the wire fraud.

4 THE COURT: Thank you very much.

5 MR. NITZE: Yes, Judge. Thank you. First off, the
6 indictment alleges significant numerous ties to the
7 United States. Your Honor has touched on some of them, and I
8 won't go through all of them here, but just to give some
9 example, CONCACAF, a confederation known as CONCACAF, is based
10 in Miami. It was based in New York. The U.S. Soccer
11 Federation is a member association of CONCACAF.

12 THE COURT: And CONCACAF is charged if Count 83,
13 with respect to Mr. Napout.

14 MR. NITZE: Is a part of the enterprise. The
15 charged enterprise is an element of the association in fact
16 enterprise, as are corporate entities that have bases of
17 operation in the United States, including -- you mentioned
18 TUSA, which is based in the United States. So there are
19 victims based in the United States. CONCACAF and the U.S.
20 Soccer Federation would count as victims. There is activity
21 meetings. There is physical conduct by charged defendants in
22 the United States. The indictment alleges that profits from
23 these schemes were derived in part from the growing market for
24 soccer in the United States.

25 The indictment allegations that Mr. Napout and his

1 co-conspirators -- I'm just going to read a section of it.
2 That their reliance on the U.S. financial system was
3 significant and sustained, and was one of the central methods
4 and means in which they promoted and concealed their scheme.
5 All of these allegations are important, and they reflect that
6 this case has real profound affects and ties to the
7 United States. But it is, I think, important for us to say
8 that doesn't actually matter for your analysis, with respect
9 to the wire fraud counts and the assessment under the test set
10 forth in *RJR*, as to whether these are being applied
11 domestically or extraterritorially.

12 The focus of congressional concern was the use of
13 the U.S. wires, and there is guidance from 2nd Circuit cases
14 and district court cases addressing criminal wire fraud
15 charges that make that point clear; and they often involve
16 allegations where the conduct, or the defendant, or the
17 victims were not located in the United States. So, for
18 example, to take off three of the 2nd Circuit cases that are
19 often cited in this context, *Kim*, you have a defendant who
20 challenges wire fraud counts because there was no conduct by
21 the defendant or codefendants --

22 THE COURT: So one question for you -- I mean, these
23 are all pre-*RJR* Supreme Court cases. Do you think that that
24 would affect -- I mean, the problem is we don't know,
25 necessarily, because there aren't any post-*RJR Nabisco* cases.

1 MR. NITZE: *RJR* does not disturb the analysis of
2 whether a wire fraud is -- how you assess whether a wire fraud
3 charge is being applied domestically or extraterritorially.
4 *RJR* assumes without reaching the issue that these are domestic
5 allegations, domestic wire fraud counts, and so *RJR*'s analysis
6 sort of clarifies the test that you apply, and then gets into
7 racketeering, the racketeering statute. And there had been
8 discussion in the Circuits below and disagreements about
9 whether you should focus on the location of the enterprise, or
10 the affects of the racketeering activity.

11 And *RJR* clarified that you look at -- it has
12 extraterritorial reach to the extent the predicates are
13 alleged -- are properly alleged, extraterritorially. Another
14 important aspect of *RJR*, which does and should inform how you
15 read some of the cases, especially in the civil RICO context,
16 is *RJR* addresses the private right of action. And it's clear
17 from some of the cases cited by counsel for Mr. Napout that in
18 the civil RICO context, where the court is grappling with the
19 prospect that private plaintiffs will be enforcing U.S. law
20 without the check of prosecutorial discretion, which is
21 specifically referenced in *RJR*, that there's a distinction to
22 be drawn.

23 They're grappling with how to set up a screen or
24 prevent private litigants from using U.S. courts and the reach
25 of the racketeering statute to get trouble damages, and

1 attorneys' fees, and the remedies that are provided there. So
2 you have below, before *RJR*, various ways of approaching it,
3 some of which, frankly, ignore the cases on the criminal side
4 of the ledger; the *Gilboe*, and *Kim*, and *Trapilo*, the cases
5 that make clear that what Congress is concerned about in the
6 wire fraud statute is the use of U.S. wires to further
7 fraudulent schemes and enterprises. And so the Supreme Court
8 in *RJR* says you must allege a domestic injury. Basically
9 there's a separate extraterritoriality analysis of that 1964,
10 the -- that provision provides private right of action.

11 THE COURT: *Petroleos*, the case relied upon by the
12 defense, you would distinguish that in some way, or say that
13 that does not negate the findings of *Kim*, and *Gilboe*, and
14 *Trapilo*.

15 MR. NITZE: Certainly. That case is in the civil
16 RICO context. It's defendants suing -- I think working on --
17 a refinery suing Mexico's national oil company or a subsidiary
18 of it, Pemex, and the court -- the court in *Petroleos* doesn't
19 even engage in an analysis of wire fraud. It's actually at
20 the level of RICO, without digging into the predicate
21 activity. And it talks about the thrust of the racketeering
22 activity, whether it's being directed at the United States.
23 It uses language very much akin to the conduct and
24 effects-type language that *Morrison* rejected, and that *RJR*
25 confirms is not the way you look at wire fraud.

1 THE COURT: But I agree with you that *RJR*, the
2 Supreme Court decision, didn't necessarily change the analysis
3 that much and largely affirmed what the 2nd Circuit had
4 already held below. Given that that's true, don't you think
5 the test is a little bit broader than what you're suggesting?
6 It's never going to be enough, even for the prosecution simply
7 to say we had three wires that went through U.S., and that's
8 enough for us to have a domestic application of the wire fraud
9 statute. You would agree with that?

10 MR. NITZE: No. If you look at the cases cited in
11 our brief, the circuit cases, *Kim*, *Gilboe*, *Trapilo* -- *Gilboe*
12 is a nonresident alien. The criminal acts all occur outside
13 of the United States. They had no detrimental effect on the
14 United States. There are some more recent district court
15 cases worth looking at, because unlike the *Petroleos*, and the
16 district court cases in the civil RICO context, these are
17 squarely criminal RICO. *Hayes*, for example, is a Southern
18 District case that involves manipulation of the yen.
19 Lie bore (phonetic) rate by an overseas defendant, and I'll
20 quote a piece of that ruling, which says:

21 The complaint alleges that the defendant conspired
22 to manipulate the lie bore (phonetic) for yen using
23 United States wires. Accordingly, there is no
24 extraterritoriality here. The complaint alleges domestic
25 application because Congress' legislative concern was to

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1 prevent the use of United States wires in furtherance of
2 fraudulent enterprises.

3 There's language like that throughout those cases,
4 the district court and circuit cases, which basically indicate
5 that, per *RJR*, which, along with *Morrison*, clarifies that what
6 you're looking at is the conduct relevant to the focus of the
7 statute, and the focus of the statute here is the use of the
8 U.S. financial system, U.S. wires, to promote fraudulent
9 schemes.

10 THE COURT: No matter how de minimis. My question
11 really is -- the position you stake out, and it's not
12 necessary for me to agree with that, but I'm curious about
13 what the limits you would say are on the government's
14 authority to prosecute, via domestic application of the wire
15 fraud statute, conduct that may really be focused entirely
16 outside the U.S.

17 Let's say we have a scheme that is completely
18 focused somewhere outside the U.S., and just to use the same
19 language, or terminology, victims are all outside the U.S.,
20 the scheme was hatched outside the U.S., and the only
21 connection is three wires -- let's just use that example --
22 that happen to pass through the U.S. banking system. It's
23 your contention that that would be enough to apply
24 domestically the wire fraud statute?

25 MR. NITZE: I would say first that your Honor

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1 doesn't have to get anywhere near to --

2 THE COURT: I agree.

3 MR. NITZE: -- considering a kind of outer-bounds
4 case, even if we're just focusing on wire activity. That's an
5 important point to make. There are lots of allegations in the
6 indictment, and there will be trial proof relating to conduct
7 in the United States, effects in the United States, outside of
8 the use of the financial system and the wires.

9 THE COURT: Part of your argument is nothing more is
10 necessary.

11 MR. NITZE: Yes. So put that aside, because the law
12 is fairly clear, especially after *RJR*, that, conduct and
13 effects, this is precisely what *Morrison* said you're not
14 supposed to do.

15 THE COURT: And *Kioga1* (phonetic).

16 MR. NITZE: Yes, in *Kioga1*, it's slightly different,
17 but it's a jurisdictional statute. But, *Morrison*, you have a
18 mortgage security broker, basically, in Florida with lies in
19 Florida. There's lots of conduct in Florida, but because the
20 shares that were purchased were on a foreign exchange, the
21 analysis in *Morrison* was the -- Congress' concern in passing
22 10(b) and the rule that flowed from that 10(b)(5) was the use
23 of domestic exchange.

24 And so it doesn't matter that you've hatched the
25 scheme here, that the lies were told here, that the source of

1 the fraud is here. What Congress is worried about is the use
2 of the domestic exchange. So when your Honor asks questions
3 about affects and conduct, *RJR* and *Morrison* make clear that
4 that's not the inquiry. So my point is if we just focus on
5 wire activity, putting aside that there are, in fact, here, we
6 would meet a conduct and affects test, is the government's
7 position. Put that aside, just focusing on the wire activity,
8 you're still not anywhere near a universe where you're looking
9 for: Is our three stray wires enough for us to hang our hat
10 on? This is alleged and will be proved, systemic reliance on
11 the U.S. financial system.

12 THE COURT: I don't disagree with you about any of
13 that. My only question is trying to have you articulate what
14 limits, if any, you think there are on the government's
15 authority. In other words, three wire transmissions for a
16 scheme that really has no other affect or sort of -- and I
17 apologize for using terminology that, I agree, is no longer
18 the operative framework, but that really have no other
19 connection to the U.S. but that. You would not argue that, I
20 don't think, just because it's the, trust me, the prosecutors
21 are doing the right thing?

22 MR. NITZE: The check of prosecutorial discretion is
23 an important one, as you distinguish between civil and
24 criminal RICO, and it's something that the Supreme Court
25 talked about in *RJR*, and it's why that private right of action

1 caused that difficulty and generated the opinion that it did,
2 and I think is why some of the civil RICO cases are different.
3 But it's not a question of whether you're to trust the
4 prosecutor; Congress has determined that the use of U.S.
5 wires, which -- in furtherance of a fraudulent scheme. It may
6 be true the whole world relies on the U.S. financial system,
7 but one hopes the whole world is not using the U.S. financial
8 systems to promote fraudulent schemes.

9 What Congress says is if you come here, use -- when
10 I say come here, use at the stability of our markets, the
11 stability of our wire facilities, and our banking institutions
12 to promote fraudulent schemes, you're in violation of federal
13 criminal law. And the cases that I have mentioned, the
14 circuit cases, *Kim*, *Gilboe*, *Trapilo*, and, I think, *Allen* and
15 *Hayes*, recently, out of the district court, those cases are
16 decided on arguments similar to the ones your Honor is
17 advancing here; that is to say the defendants in those cases
18 say I wasn't in the U.S.; the scheme wasn't hatched in the
19 U.S.; the victim wasn't in the U.S.

20 In *Trapilo*, in addressing that type of argument,
21 the court says these cases teach, as the statute plainly
22 states, what is proscribed is the use of the telecommunication
23 system of the United States. Nothing more is required. The
24 identity and location of the victim and the success of the
25 scheme are irrelevant. Now, I guess I prefer not to advance

1 our argument way into an area that's very far away from where
2 our case is, but I think those cases stand for the proposition
3 that if you are using the U.S. wires to advance a criminal
4 scheme, you're on the hook. And I think *RJR's* analysis, the
5 test that it clarifies, and that *Morrison* clarifies, make that
6 clear; that's what you're looking at. But, here, they're
7 wires galore, reliance on the financial system galore, and so
8 we're not close to -- whatever that line is, even if I were
9 incorrect, that no matter what, the use of the wire puts you
10 on the hook. We're not close to that line.

11 THE COURT: Did you want to address at all,
12 Ms. Pinéra's argument about an allegation that the conspiracy
13 actually contemplated using -- I guess you are saying it
14 doesn't matter if the conspiracy is alleged, contemplate use
15 of the wires. But I think you have alleged that, as a matter
16 of fact, that that was contemplated as part of the conspiracy.

17 MR. NITZE: Yes. Not only we wouldn't need to prove
18 actual use of U.S. wires, but we will; and that is alleged
19 over and over in the indictment. The conspirators are alleged
20 to have used U.S. wires to make these bribe payments, to
21 receive bribe payments, to promote the schemes, generally.
22 The wires needn't be bribe wires to constitute wires
23 sufficient to be wire fraud. They have to be wires that
24 promote the unlawful scheme.

25 THE COURT: But does the government need to allege

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1 that the conspiracy was specifically to use the U.S. wires, as
2 opposed to we have a conspiracy that we're going to bribe you,
3 officials of CONMEBOL, or FIFA? And does it have to say that
4 you're going to use the wires to do that?

5 MR. NITZE: A substantive wire fraud charge is a
6 charge that you've had a scheme to -- an unlawful fraudulent
7 scheme that makes use of U.S. wires. The *mens rea* required is
8 that it be foreseeable that the U.S. wires will be used; but,
9 here, not only is it foreseeable, it happens over and over
10 again.

11 THE COURT: Did you want to say anything,
12 Mr. Tuchmann?

13 MR. TUCHMANN: No.

14 MR. NITZE: May I have a moment?

15 THE COURT: Go ahead.

16 (Pause in proceedings.)

17 MR. NITZE: Thank you.

18 MS. PINERA-VAZQUEZ: If I may address four of
19 statements? First of all, I may have misheard Mr. Nitze, but
20 Congress has not determined wire fraud should be applied
21 extraterritorial. In fact, there's no specific statement in
22 the wire fraud statute that says --

23 THE COURT: I think there's no disagreement. The
24 government's argument is this is a domestic application.
25 You're arguing about the contours of the domestic application

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1 of the wire fraud statute.

2 MS. PINERA-VAZQUEZ: There's nothing in the wire
3 fraud statute where Congress' intent is reflecting that it
4 should be applied.

5 THE COURT: We all agree on that.

6 MS. PINERA-VAZQUEZ: I wanted to make sure. And why
7 that's important is because the cases that the government is
8 mentioning, which are all pre-*RJR* cases, the *United States*
9 *versus Kim* -- they also rely on the *Pasquatino* (phonetic)
10 case, and I believe it's called --

11 THE COURT: *Trapilo*.

12 MS. PINERA-VAZQUEZ: -- *Trapilo*. All those are
13 pre-*RJR*. And contrary to what the government says, it is
14 actually quite significant. And the *Kim* case, for example, in
15 the *Kim* case, the 2nd Circuit, in 2001 -- actually decided
16 before *Morrison*, which was a 2010 case -- they specifically
17 ruled that a reference to foreign commerce does not indicate
18 congressional intent. So according to him, Congress
19 amended -- that was the argument, that they had amended the
20 wire fraud statute to add foreign commerce, to reach fraud
21 schemes in furtherance of foreign wires.

22 And the test that they used before *Morrison* was that
23 such a reference does not mean that the wire fraud statute is
24 applicable extraterritorially. But what it does address is
25 the test by *RJR*, which is the shift in focus to the looking at

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1 the predicates act. No longer look at cause and effects.

2 Look at the predicate acts. That was a shifted focus.

3 THE COURT: You're talking about the wire fraud
4 statute?

5 MS. PINERA-VAZQUEZ: The wire fraud statute, Judge.
6 The other thing I want to point out, because the government
7 made a big deal about the fact that *RJR* was a civil RICO, but
8 I think the Court will agree with me that there is significant
9 case law in this circuit and in others that because it is a
10 hybrid statute, that includes both a criminal cause of action
11 and a civil cause of action, that the Supreme Court has always
12 said that those interpretations and the development of the
13 case law go hand and hand. In other words, one part of the
14 RICO statute is not interpreted a certain way because it is
15 civil and another one because it's criminal.

16 And I'd like to point out to the case of *Sedima*
17 (phonetic) *versus Imrex*, I-m-r-e-x, 473 U.S. 479, 1985 case,
18 where the Supreme Court specifically held that they routinely
19 reject proposed civil-criminal decisions in the construction
20 of hybrid statute with criminal and civil applications such as
21 RICO. So because *RJR* was a civil case, does that mean that it
22 should be interpreted any different in its criminal
23 application? And I believe Judge Alito actually did say that,
24 that even though it's a -- it was a civil case. It was *RJR*
25 *Nabisco versus the European Union*. You still apply the same

1 law to the criminal part of it.

2 What the government is referring to, which I believe
3 it is 1962 F, which is where the attorneys' fees and all that
4 other civil stuff comes in, that has nothing to do with
5 criminal application. It's separate and apart. It's in a
6 separate section in the opinion, towards the end. But when
7 the court is interpreting this test, the two-step test that
8 has to be taken, in analyzing whether domestic law should be
9 applied to extraterritorial, it is the same thing, civil or
10 RICO. So all those cases that have interpreted *RJR*, whether
11 they're civil or criminal, are applied exactly the same.
12 There is no distinction.

13 THE COURT: Correct me if I'm wrong; I think part of
14 *RJR* was a finding that because it was a civil case there had
15 to be a greater showing of an interest in the U.S. or some
16 contact. And I'm looking at the government in part because I
17 think it was in *RJR*, and that's where this distinction was
18 made about in the criminal context you wouldn't necessarily
19 have to have that, but in the civil context more had to be
20 shown, for the private right of action. And I'm looking at
21 page 2106 of the Supreme Court's decision, 136 Supreme Court
22 2090. And that's ultimately why the decision gets sent back
23 to the 2nd Circuit.

24 "The creation of a private right of action raises
25 issues beyond the mere consideration of whether underlying

1 primary conduct should be allowed or not, entailing, for
2 example, a decision to permit enforcement without the check
3 proposed by prosecutorial discretion," which is, I think, what
4 Mr. Nitze was referring to. So there is expressly recognized
5 in *RJR* distinction between RICO cases brought by the
6 government that in theory have the prosecutorial check on them
7 and civil cases, such that there's an additional requirement
8 in a private right of action to show that a person was injured
9 in his business or property by reason of the Section 1962
10 violation. And, admittedly, it goes to the damage provision.

11 MS. PINERA-VAZQUEZ: What's important is the entire
12 previous section, when it's interpreting what the test should
13 be in applying these laws to form condone (phonetic), that
14 does not change whether it's a civil or criminal case.

15 THE COURT: Let me cite you to another part of the
16 same decision, 2108. It says nothing in Section 1964(c)
17 provides a clear indication that Congress intended to create a
18 private right of action for injuries suffered outside the
19 United States. So, there, it seems to again reenforce the
20 notion that the private right of action, which, of course, is
21 a congressional act, with respect to its creation, is
22 different than the criminal application.

23 So I think it contradicts the more general principle
24 you're saying about interpreting statutes that have both a
25 criminal and civil application exactly the same, where

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1 at least there seems to be some congressional intent that they
2 be applied differently and, perhaps, have stricter
3 requirements as to extraterritorial application for a civil
4 action. That's what I read *RJR* as saying.

5 MS. PINERA-VAZQUEZ: I believe that's the section
6 that's talking about the damages, when it comes to private
7 damages.

8 THE COURT: Yes, but, again, I think it goes to this
9 notion that somehow Congress didn't necessarily want to treat
10 the civil application of RICO the same as the criminal
11 application. Maybe you're right in terms of the --

12 MS. PINERA-VAZQUEZ: -- the interpretation of the
13 underlying statutes of the test. It's the same test whether
14 or not it's a civil case or a criminal case.

15 THE COURT: Go ahead, Mr. Nitze. What did you want
16 to say?

17 MR. NITZE: *RJR* doesn't say anything, and it's
18 entirely consistent with -- doesn't say anything about
19 entirely consistent with the cases that proceeded it out of
20 this Circuit and the district courts here in the criminal RICO
21 context that discuss when a wire fraud charge is domestic wire
22 fraud charge. The *RJR* case talks about -- assumes for the
23 purpose of its opinion that there were domestic wire fraud
24 allegations. Before it gets to the private cause of action,
25 it is sorting through how do you conduct this

1 extraterritoriality analysis in the context of RICO.

2 RICO is an unusual statute because you have an
3 enterprise; you have the pattern of activity, and discussion.
4 Where do you focus? Is it where the enterprise is? Is it
5 where the affects are? And it clarified its extension is
6 extraterritorial to the extent the predicates alleged in
7 support of it apply extraterritorially. It didn't get into
8 when you're looking at a wire fraud charge it is a domestic or
9 an extraterritorial application. I want to be clear we are
10 alleging domestic violations of the wire fraud statute. And
11 those cases from the Circuit, in *Hayes* and *Allen*, are all
12 still good law.

13 THE COURT: Right. Your view is that *RJR* left all
14 those cases alone, with respect to that issue.

15 MR. NITZE: Yes. My point in raising the passage
16 your Honor read, which was what I was referring to that
17 references prosecutorial discretion, my point in focusing on
18 the private cause of action is only that to the extent there
19 is tension in the district court cases that have been cited by
20 the parties here, that tension -- there's a line running
21 through those cases. Some are on the civil side. And it
22 stands to reason that the courts on the civil side dealing
23 with what in those cases are civil plaintiffs seeking damages
24 from civil defendants, they're grappling with the very concern
25 that Justice Alito talks about here, in concluding need to

1 show domestic injury, which is are we going to allow just
2 three wires here? Is this enough?

3 And to the extent there is a tension, it is likely
4 informed by that, by trying to figure out how to cabin the
5 civil litigation. The Supreme Court has now clarified how you
6 do that. Instead of wondering about how many wires, they will
7 say have you alleged a domestic injury, and they will follow
8 the course laid out by the Supreme Court. But it's telling
9 that those cases often ignore or fail to discuss the cases on
10 the criminal side that deal with wire fraud. There are some
11 that do. There's one district court case that says -- I think
12 it's *Kim* where the circuit says we're not going to have a
13 couple of civil RICO cases that make us throw out the holdings
14 of these criminal cases.

15 THE COURT: Agreed. But you have to admit that if I
16 adopt wholesale you're position, literally one wire through
17 the United States, or in the United States, would be enough to
18 apply domestically the wire fraud statute to conduct -- and,
19 again, I'm going to use old language -- that really had no
20 context at all with the U.S., where the scheme and everything
21 else that happened with respect to the scheme occurred by
22 foreign individuals outside the U.S., that's the logical end
23 of the argument that you're making.

24 MR. NITZE: We're urging you to follow --

25 THE COURT: I'm not saying you're doing that.

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1 MR. NITZE: The law on that point is clear. You
2 don't have to get there in terms of -- that's not this case.
3 The one you're describing is not this case.

4 THE COURT: I understand your argument.

5 MS. PINERA-VAZQUEZ: One last thing, because
6 Mr. Nitze just said that they're arguing a domestic
7 application. *RJR* is pretty clear that it said there are two
8 ways to apply extraterritorial laws to extraterritorial
9 jurisdiction, and -- it's in the statute, and Congress said
10 so, or you have to go through this whole focus analysis. It's
11 not just, oh, we're just applying it domestically. It has to
12 go within *RJR Nabisco* second-step policy, and they have to
13 show that the focus of the statute was --

14 THE COURT: No disagreement there; that's exactly
15 what the government says they are arguing and doing.

16 MR. NITZE: We focused our arguments on wire fraud,
17 I think, rightly so. I just want to make clear the
18 racketeering conspiracy allegation is not limited to wire
19 fraud predicates. There are money laundering predicates that
20 do have extraterritorial reach; there are obstruction of
21 justice predicates that do have extraterritorial reach, but it
22 makes sense that we focus on wiretap.

23 THE COURT: Understood. Anything else from the
24 defense?

25 MS. PINERA-VAZQUEZ: Nothing else, your Honor.

1 THE COURT: Thank you, everyone. I'm going to issue
2 an opinion shortly and take this under advisement, but you'll
3 hear from me very soon. Thank you, everyone.

4 (Proceedings adjourned.)

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8 I certify that the foregoing is a true and correct
9 transcription of the record from proceedings in the
above-entitled case.

10 /s/ Nicole Canales
11 Nicole Canales

February 16, 2017
Date

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